RESEARCH REPORT

AUSTRALIAN BUILDING REGULATION AND LIABILITY REFORMS

HEALTHY HOUSING AND COMMUNITIES SERIES

CMHC SCHL

HOME TO CANADIANS

Canada

CMHC—Home to Canadians

Canada Mortgage and Housing Corporation (CMHC) is home to Canadians. In everything we do, we help Canadians live in safe, secure homes. As the Government of Canada's national housing agency, we play a major role in Canada's housing industry. CMHC develops new ways to finance home purchases. We encourage innovation in housing design and technology. Our mortgage loan insurance helps Canadians realize their dream of owning a home.

Canadians benefit from our work with public, private and not-for-profit partners to improve the quality, accessibility and affordability of housing everywhere in Canada.

CMHC assistance helps low-income and older Canadians, people with disabilities and Aboriginals live in decent, affordable homes. We create jobs for Canadians with products and services that help the housing industry export its knowledge and skills to other countries.

CMHC's leading-edge research improves the quality and affordability of housing. To help Canadians benefit from our housing expertise and make informed decisions, CMHC has become Canada's largest publisher of housing information. We also have Canada's most comprehensive selection of information about homes and housing.

Canadians can easily access our information through retail outlets and CMHC's regional offices.
You can also reach us by phone at
1 800 668-2642 (outside Canada, (613) 748-2003)
by fax at (613) 748-4069
To reach us online, visit our home page at www.cmhc-schl.gc.ca

Canada Mortgage and Housing Corporation supports the Government of Canada policy on access to information for people with disabilities. If you wish to obtain this publication in alternative formats, call 1 800 668-2642.

100-06974/

Australian Building Regulation and Liability Reforms

Prepared for:

Canadian Home Builders' Association
and
Canada Mortgage and Housing Corporation

September 1999

CMHC offers a wide range of housing-related information, For details, call 1 800 668-2642 or visit our home page at *www.cmhc-schl.gc.ca*

Cette publication est aussi disponible en français sous le titre : *Réformes de la réglementation australienne de la construction et des dispositions en matière de responsabilité,* (PF 0380)

This research project was funded by Canada Mortgage and Housing Corporation (CMHC) and the Canadian Home Builders' Association (CHBA). The contents, views and editorial quality of this report are the responsibility of the author(s) and CMHC and CHBA accept no responsibility for them or any consequences arising from the reader's use of the information, materials and techniques described herein.

CANADIAN CATALOGUING IN PUBLICATION DATA

Lampert, Greg

Australian building regulation and liability reforms
Issued also in French under title : Réformes de la réglementation australienne de la construction et des dispositions en matière de responsabilités.
ISBN 0-660-18119-3
Cat. no. NH15-357/2000E
1. Building laws – Australia.
2. Construction industry – Law and legislation – Australia.
I. Canadian Home Builders' Association.
II. Canada Mortgage and Housing Corporation.
III. Title.

HD7379.L35 2000 343.94'07869 C00-980146-4

© 1999 Canada Mortgage and Housing Corporation. All rights reserved. No portion of this book may be reproduced, stored in a retrieval system or transmitted in any form or by any means, mechanical, electronic, photocopying, recording or otherwise without the prior written permission of Canada Mortgage and Housing Corporation. Without limiting the generality of the foregoing, no portion of this book may be translated from English into any other language without the prior written permission of Canada Mortgage and Housing Corporation.

Printed in Canada
Produced by CMHC

Executive Summary

Since the early 1990s, there have been major reforms of building regulations in most states in Australia - reforms which, from a Canadian perspective, appear little short of revolutionary. They were designed to address challenges similar to those currently evident in Canada - such as:

- The costly and lengthy building approvals process;
- Liability implications for builders, architects, engineers and building officials resulting from recent legal cases, particularly:
  - builder's liability for "economic losses"
  - joint and several liability
  - apparently perpetual liability for negligence;
- Attempts by municipalities to limit their liability for inadequate inspections, together with a move to use more private sector inspection and certification agencies;
- The implications of new objective-based codes (which are similar to performance codes, but with "deemed to comply" solutions);
- Regulatory obstacles to innovation;
- Interprovincial barriers to trade and the movement of skilled workers;
- The absence of professional designation and accreditation for people with key skills (e.g. building inspectors);
- Concerns about consumer protection and the adequacy of home warranty coverage;
- Bogus owner-builders who avoid many of the constraints applied to legitimate builders;
- Increased underground activity in construction;
- The lack of quality assurance approaches in building; and
- The need to enhance the professionalism of the building industry.

These challenges have led to growing interest in Canada in the Australian building reforms - interest which was spurred by the paper Preliminary Analysis of Australian Building Regulation and Liability Reforms, prepared by the author of this report in May 1998. This report expands on the issues raised in the Preliminary Analysis report. It is based on personal interviews with Australian federal and state government regulatory officials, representatives of building industry associations, builders, building certifiers and other professionals involved in the industry.

Overview of the Reforms

The scope of the reforms varies from state to state; however, it appears that most states are moving towards the "Victorian model" - the building regulations adopted in the state of Victoria which include the following key elements:

- **Limitations on liability for building practitioners** - the liability period for property damage resulting from defects in the design, construction, approval or inspection of buildings has been capped at 10 years. In addition to the 10-year cap, the doctrine of "joint and several" liability has been replaced with "proportionate" liability according the involvement of defendants - no party is required to cover more than their share of the judicial apportionment of damages. The 10-year cap does not extend to claims for personal injury or death which may result from building defects.
- **Privatization of building approvals and inspections** - building approvals may now be obtained from private sector building certifiers. This replaces the traditional monopoly of local government building officials in this area and has led to competition among private building certifiers and municipal building certifiers. Municipal building certifiers are also allowed to issue building approvals for projects outside of their local government area. Building certifiers examine plans to ensure that they conform to appropriate codes and standards and other regulations, issue building permits, carry out inspections (where necessary), and issue occupancy permits. When private sector building certifiers are used on a building job, the municipal role is essentially reduced to one of record-keeping of the final documents.
- **Compulsory registration of building practitioners** - persons who undertake the design, construction or demolition of buildings (including building certifiers and inspectors) are required to register annually with the Building Practitioners Board (a state-run body in Victoria) and receive a licence which allows them to undertake work anywhere in the state. There are a number of categories of building practitioners: building certifiers, inspectors, engineers, designers, commercial builders and residential builders (among others) - with varying qualifications and experience required for registration in each category. Evidence of a current insurance policy is also a requirement for registration. In Victoria, anyone who contracts to undertake building work for a building owner (either new work or renovations) which is valued at $5,000 or more is required to be registered with the Building Practitioners Board. Subcontractors to a builder or general contractor are not required to be registered.

- **Compulsory insurance for building practitioners** - building practitioners are required to carry insurance to cover defects in the building work. The type of insurance required depends on the specific profession of the practitioner. Home builders are generally required to have job-specific insurance coverage (similar to Canadian warranty coverage). The purpose of the compulsory insurance is to ensure that there are sufficient resources available to cover practitioners' shares of liabilities in the event of claims for damages.

These reforms were introduced in Victoria as a package. The reforms constituted an integrated approach to building regulations which recognized that each part is dependent on other parts. For example, compulsory insurance of building certifiers was a critical element in the privatization of the building approvals function - to ensure that there would be sufficient funds to rectify any building defects resulting from the private certifiers' errors or omissions. At the same time, limitations on liability were essential if the premiums for insurance cover were to be reasonable. Registration and insurance for other types of building practitioners was necessary if there was to be justice under the change to proportionate liability (i.e. it is necessary to ensure that all defendants have the resources to pay their proportionate share of damages).

Assessment of the Reforms

There is little doubt in the minds of any of those interviewed in the process of this assignment that the building regulation reforms introduced in the state of Victoria have been a great success. Private certification has resulted in reduced time frames for obtaining building approvals and, in combination with the performance-based Building Code of Australia, enhanced innovation in construction. Compulsory registration and insurance for building practitioners can be expected to lead to a more professional building industry - particularly as new building practitioners (with appropriate qualifications) gradually replace the practitioners who were registered through "grandfathering". The provision of a straightforward and fair dispute resolution process has greatly simplified and reduced the costs associated with building disputes. Liability capping and proportional liability have created an environment where insurance companies are prepared to offer insurance for building practitioners at competitive premiums. Compulsory insurance, plus the liability reforms, ensure that all parties to the process (building owners, certifiers, builders and local authorities) are treated fairly.

The building regulation reforms introduced in Victoria are a package - the performance of each part is dependent on other parts. Other states have not adopted all aspects of the package; as a result, they have not enjoyed the same level of benefits as Victoria.

The Victorian model is by no means perfect. There are aspects that could be improved. Better monitoring and education of building practitioners appears necessary. Better integration of building and planning approvals (and firmer steps towards private certification of planning) would greatly streamline and simplify the overall development process. Some may also question whether it is essential to centralize all functions (including registration of building practitioners) in a public organization such as the Victorian Building Control Commission.

However, clearly, these are relatively minor concerns. The Victorians appear to have gotten most of it right. No one in the state is suggesting major changes in what has emerged as the obvious model for the rest of the country to follow. Builders, certifiers, local authorities and building owners all seem generally satisfied with the new system and look forward to further initiatives to address the concerns that remain.

Lessons for Canada

Canada faces many of the same challenges which stimulated interest in the reforms of building regulations in Australia. Seemingly unlimited potential liabilities are a major concern to everyone involved in building - in particular, municipalities which, with their "deep pockets" are frequently the main targets in building disputes. Adequate consumer protection is a major concern - particularly for home buyers. The need for increased professionalism in the building industry is evident. There are concerns about the lengthy building approvals process and the costs of this process - not only in terms of dollars and delays, but also in the effect which "risk-averse" municipal building officials have on innovations in building.

When faced with these very real and important challenges, the Australians mounted a national effort (funded jointly by the federal government and the states) to seek a common set of answers to deal with the challenges. Many of the states did not follow through with the full package of building regulation reforms recommended by national consultative process. However, the reforms clearly have been successful in Victoria where the full package was adopted.
There are clear advantages for the building sector through the types of reforms of building regulations which have been adopted in Australia:

- Companies and individuals involved in the building industry benefit from liability reform and insurance protection;
- The building industry benefits through a more transparent and competitive building approvals process, a registration system which encourages increased professionalism for those in the industry, an efficient dispute-resolution process, and enhanced prospects for innovation;
- Municipalities benefit by no longer being threatened with being "insurers of last resort" in the event of building defects;
- Insurers are able to provide insurance coverage at competitive rates through a combination of the liability reforms and the registration system which promotes professional practices among building practitioners;
- Consumers benefit through an efficient and accountable system which promotes innovation (and hence lower costs) while also providing protection against building defects.

Canada has a lot to learn from the Australian experience - not only in the specifics of the reforms (which themselves appear extremely attractive), but also in the process through which the Model Building Regulations were formulated. As in Australia, Canada's federal government is not constitutionally responsible for building regulation; however, the federal government has a major interest in minimizing economic inefficiencies and assisting the provinces in reaching a common means of dealing with similar challenges. The federal/provincial process used to formulate the Model National Building Code is clearly one which could be used in promoting a national approach to building regulation.

Indeed, it was the forerunner of the ABCB that spearheaded the development of the Model Building Regulations in Australia. It is interesting to note that unlike Canada, which had its first National Building Code in 1941, Australia came late to a federal/provincial approach to building regulations - the first BCA was adopted in 1987. However, also unlike Canada, Australia did not restrict federal/provincial cooperation in this area only to the technical aspects of building. The Australian model building regulation reforms were a result of this broader view of the benefits of national building regulations.

In Canada, we need to look seriously at significant changes in our building regulations. The Australian reforms represent a useful starting point in examining potential means of addressing many of the challenges facing the building industry today.

Table of Contents

Executive Summary

1. Introduction 1

2. Background and Overview of the Building Reforms 3

The Pressures for Reform of Building Regulations 3
Perceived Problems with Pre-Reform Building Regulations and Benefits from Reform 3
Recommended National Reform of Building Regulations 4
Formulation of Model Building Legislation 5
Limitations on Liability - Key to the Reforms 6
Adoption of the Reforms - a State by State Process 7

3. The Australian Building Regulation Reforms 9

3.1. **Overview of the Building Regulation Reforms** 9
The Building Control Commission 10
The Building Appeals Board 10
3.2. **Limitations on Liability for Building Practitioners** 11
3.3. **Privatization of Building Approvals and Inspections** 11
Qualifications for Building Certifiers 12
The Building Certification Process 13
Benefits of Private Certification 14
Problems with the Building Approvals System 16
3.4. **Compulsory Registration of Building Practitioners** 18
Victoria - Building Practitioners Board 18
Varying Building Practitioner Requirements in Other States 20
Owner-Builders 21
Dispute-Resolution 21
3.5. **Compulsory Insurance for Building Practitioners** 23
Types of Insurance Cover 23
Warranty Coverage Versus Annual Cover for Domestic Builders 24
Insurance Requirements in Victoria 25
Warranty Period Less Than the Liability Period for Builders 26
The Cost of Insurance 27
3.6. **Sum-Up - Variations in the Reforms by State** 27

4. Overall Assessment and Lessons for Canada 29

Lessons for Canada 29

Appendix

Glossary of Terms
Interviewees in Australia
Endnotes

1. Introduction

Since the early 1990s, there have been major reforms of building regulations in most states in Australia - reforms which, from a Canadian perspective, appear little short of revolutionary. The scope of the reforms varies from state to state; however, it appears that most states are moving towards the "Victorian model" - the building regulations adopted by the state of Victoria which include the following key elements:

- Privatization of building approvals and inspections;
- Compulsory registration of building practitioners[1];
- Compulsory insurance for building practitioners; and
- Limitations on the liability claims against building practitioners.

In Canada, the building industry faces many challenges which are similar to those which the Australian reforms were designed to address - these include concerns about:

- The costly and lengthy building approvals process;
- Liability implications for builders, architects, engineers and building officials resulting from recent legal cases, particularly:
  - builder's liability for "economic losses"
  - joint and several liability
  - apparently perpetual liability for negligence[2];
- Attempts by municipalities to limit their liability for inadequate inspections, together with a move to use more private sector inspection and certification agencies;
- The implications of new objective-based codes (which are similar to performance codes, but with "deemed to comply" solutions);
- Regulatory obstacles to innovation;
- Interprovincial barriers to trade and the movement of skilled workers;
- The absence of professional designation and accreditation for people with key skills (e.g. building inspectors);
- Concerns about consumer protection and the adequacy of home warranty coverage;
- Bogus owner-builders who avoid many of the constraints applied to legitimate builders;
- Increased underground activity in construction;
- The lack of quality assurance approaches in building; and
- The need to enhance the professionalism of the building industry.

These challenges have led to growing interest in Canada in the Australian building reforms-interest which was spurred by the paper *Preliminary Analysis of Australian Building Regulation and Liability Reforms,* prepared by the author of this report in May 1998.

This report expands on the issues raised in the *Preliminary Analysis* report. It is based on an extensive series of interviews with Australian federal and state government regulatory officials, representatives of building industry associations, builders, building certifiers and other professionals involved in the industry - in five Australian states and territories: Victoria (Melbourne), New South Wales (Sydney), Queensland (Brisbane), South Australia (Adelaide), and the Australian Capital Territory (Canberra). The interviews were conducted during the March-May period of 1999. In addition to the interviews, a large volume of (often confidential) reports were reviewed to provide background to the information gathered in the interviews.

In particular, the assistance of John Kotsopoulos, Principal Policy Advisor at the Victorian Building Control Commission, must be acknowledged. John was heavily involved in the formulation of the model national building legislation in the early 1990s and the passage of the Building Act through the Victorian Parliament. He has a wealth of knowledge about the Australian reforms and his assistance and comments were extremely helpful in the preparation of both the original *Preliminary Analysis* report and this report.

In addition to this introduction, the report is structured into the following three sections:

2. Background and Overview of the Reforms - a brief description of the reforms and a review of the process which preceded their introduction.

3. The Building Regulation Reforms - a more detailed description of the reforms and a discussion of the benefits and problems which have arisen since their introduction.

4. Overall Assessment and Lessons for Canada - conclusions regarding the success of the reforms in Australia and their potential for application to Canada.

In addition, there is an appendix which lists the officials interviewed in Australia as part of the background research for the report. There is also a Glossary which provides a description of some of the Australian terms (and acronyms) which may not be familiar to a Canadian audience.

2. Background and Overview of the Building Reforms

Constitutional responsibility for building regulation in Australia rests with the states and territories[3]. While the federal government (often called the Commonwealth government in Australia) plays an indirect facilitative role in building regulation through support of national organizations such as the Australian Building Codes Board (ABCB), as in Canada, implementation of building regulations is up to the individual states. As a result, there are variations in building regulations from one state to another.

The foundation to the building regulation reforms discussed here was an attempt to streamline and harmonize regulations among the states which started roughly a decade ago. This section briefly describes this process and summarizes the main aspects of the reforms. In reviewing the process leading up to the adoption of the building regulation reforms in Australia, it is particularly interesting, from a Canadian perspective, to see the similarities between the challenges which the reforms were intended to address (in Australia) and the challenges which face the Canadian building industry today.

The Pressures for Reform of Building Regulations

In the latter half of the 1980s, the Australian government, in cooperation with the states, embarked on a National Micro Economic Reform Program involving various sectors of the Australian economy - including the building industry. The purpose of the reforms was to eliminate inefficiencies in the economy which detracted from competitiveness.

Within the building industry, as a result of a "clearly recognized need to reform the systems for regulating land development and building activity in Australia"[4], the Building Regulation Review Task Force was established by a special State Premier's Conference in 1989. The mandate of the Task Force was to undertake a review of the technical regulations and other requirements affecting the construction of buildings in Australia. According to its terms of reference, the Task Force was to identify, research and document reforms that would:

- Improve the cost-effectiveness of building while maintaining building integrity;
- Reduce the cost and increase the flexibility of regulation, while providing for control of public health, safety and other aspects of community concern;
- Facilitate introduction of new building products, processes and systems to enhance the contribution of the building industry to Australia's overall economic development; and
- Make recommendations concerning possible regulatory reform.

Perceived Problems with Pre-Reform Building Regulations and Benefits from Reform

In the course of its investigations, the Task Force identified a number of problems with building regulations in Australia, including:

- Lack of clear objectives of building regulations;
- Regulations which restrict industry from applying the latest design skills and construction techniques;
- Lack of uniformity of administration and application between states and between local government areas within states;
- Complex and non-transparent approvals processes;
- Lack of predictability for applicants under the approvals systems;
- Use of outdated regulations not related to current social goals;
- Lack of incentives for approving bodies to improve efficiency;

- Lack of incentives to introduce quality assurance programs;
- Liability provisions which throw undue risk upon local authorities and lead them to take a risk-averse approach to regulation of buildings.

The Task Force concluded that reform of regulations leading to a coordinated national approach would yield a number of benefits in terms of:

- Scale - through creation of a single market for goods and services;
- Efficiency - through a better approach by regulators and applicants;
- Predictability - through the use of agreed, transparent administrative and approvals systems; and
- Transferability - of goods and skills from one part of Australia to all other parts.

Recommended National Reform of Building Regulations

The Task Force recommended the establishment of a national framework of building regulations which would promote the reform process and facilitate uniformity among the states. The key elements of the recommended national framework were:

- **A Model Building Act** - to achieve consistency of legislation among the states;
- **A Model Administrative Code** - to achieve consistency and predictability in administration of legislation and approvals systems;
- **The Building Code of Australia** (BCA) - to ensure uniformity of technical regulations relating to buildings;
- **Building Standards** - to provide the technical underpinning to the BCA; and
- **An Australian Building Regulation Board** - to establish, maintain and develop the national framework.

Thus, the recommended framework included a building act which would ensure consistency among the states in terms of both technical regulations (the BCA' and standards) and the administrative processes involved in building regulation. The Task Force had a particular concern about these administrative processes - it identified the following important components of an efficient administrative system for building regulation:

- An **assessment system** in which requirements on the applicant are clear, unambiguous and the minimum necessary to achieve the objectives of regulation.
- An **assessment procedure** which is cost-effective, predictable and transparent; where assessments are coordinated to minimize delays and where assessments are in conformity with the objectives of regulation. Decisions should be predictable, coordinated and binding and be available progressively, where appropriate.
- A **dispute resolution procedure** which operates with equity and speed, which focuses on technical issues and which is not unduly legalistic in nature.

Additional beneficial measures recommended by the Task Force included:

- **Consolidation of legislative and technical regulation of buildings** in the states into a common set of building acts plus the Building Code of Australia.
- **Greater use of private sector professional certification,** in parallel with local government certifiers, in approving the design, construction and occupancy of buildings, in accordance with an agreed national scheme.
- **Reform of liability laws** surrounding building design and construction - existing liability provisions were considered to entail undue financial risk upon local authorities. National guidelines were recommended including:
  - Statutory 10-year limit on duration of liability and a statutory cap on amounts payable;

  - Statutory assignment of risk according to the degree of defined responsibility of each participant in the building work; and
  - Exclusion of local authorities from liability where they do not have the responsibility for certification.
- **A comprehensive form of project warranty insurance for building projects** to be introduced in parallel with liability reforms and prior to the introduction of full private sector professional certification of buildings.

Within the broader building industry, the Task Force "recognize(d) that the house building sector has particular characteristics and needs which distinguish it from the rest of the building industry. As a general rule, the regulatory system has not recognized these special characteristics"[6]. The Task Force recommended that the reform process should include several steps designed to meet the special needs of the housing sector, including licencing of builders and tradesmen and compulsory latent defects insurance, along with an administering body in each state to manage the insurance and licencing system and provide the necessary enforcement.

Formulation of Model Building Legislation

Before the Task Force had concluded its work in 1991, the broad outline of its conclusions was becoming apparent - from a number of reports critical of aspects of the legislation governing the construction of buildings in Australia. Therefore, in 1990, following an agreement between the federal government and the state ministers responsible for local government, the Australian Uniform Building Regulations Co-ordinating Council (AUBRCC) embarked on a process to prepare model building legislation for consideration by the states[7].

The stated purpose of the AUBRCC initiative was to "enable the introduction of microeconomic reform in this [building and construction] industry, to enable national uniformity and consistency of approach, and to increase efficiencies within the industry"[8].

Particular motivations for the drafting of new model building regulations were:[9]

- Liability reform - there was a mounting desire for certainty of limitation periods for lawsuits, and disenchantment with the doctrine of joint and several liability.
- "Regulamania" and Duplication - a number of inquiries had concluded that there were potentially enormous cost savings that could be achieved through less regulation.
- Interstate consistency with regard to adoption of the BCA - it was feared that technical uniformity of building was threatened by lack of uniform umbrella legislation to minimize variations to the BCA.
- Cost savings - one of the paramount objectives was to reduce the costs of building which were considered to be excessive due to:
  - Excessive insurance premiums caused by uncertain and indefinite liability occurrence;
  - Costs due to the exposure of local governments to questionable liability claims;
  - Costs imposed by regulatory authorities processing applications;
  - Costs resulting from imperfect drafting or inappropriate regulation, which led to incomplete or inaccurate applications, the need to meet sometimes competing and conflicting requirements of authorities and the need to modify documents to accommodate these difficulties; and
  - Costs due to delays of projects.

The major innovations contained in the model building regulations were:

- **Dispute resolution for matters relating to building regulation** - the model legislation provides for the formation of a Building Appeals Board with jurisdiction to determine all technical disputes and points of law. The Board's membership would consist predominantly of technically qualified referees, with only a few legally qualified persons. The decisions of the Board could not be appealed on merit or points of law.
- **Private certification** - the model legislation allows a building applicant to engage a private certifier to certify all aspects of construction requiring approval (including building permits, inspections and certificate of occupancy) or to opt for the traditional route where approval is obtained through the local authority.
- **Liability reforms** - the model legislation provides for the establishment of certainty in respect to time limitations for lawsuits (10 years from the date of the certificate of occupancy) and reform of joint and several liability.
- **Insurance** - the model legislation allowed for the regulations to require insurance for building practitioners to cover the liability period.

Limitations on Liability - Key to the Reforms

Though it is clear that the reforms are an interdependent package, the liability reforms (10-year cap and removal of "joint and several" liability with respect to building defects) were clearly an essential component. Without clarity with respect to liability, it was considered to be impossible for insurers to quantify risk (and therefore establish an appropriate level of premiums). Without insurance, it would not be possible to replace the "deep pockets" of local authorities in the building approvals process with private certification.

In assessing the appropriate limitation period for liability, the drafters of the model legislation cited the following requirements - the limitation period should be:

- Sufficient to ascertain when the cause of action accrues and therefore when the limitation period commences;
- Long enough for most defects to become apparent;
- Sufficiently limited for it to be practicable to obtain insurance coverage for the whole period; and
- Not so long that records and witnesses become unavailable or unreliable[10].

The 10-year period was considered appropriate based on evidence from several sources that virtually all serious building defects are detected within 10 years of the completion of a structure. An examination of the claims experience of over 4,000 engineers by the Association of Consulting Engineers Australia identified the following pattern of claims for building defects:

Detection within 1 year	15%
Cumulative	15%
Detection within 1-3 years	15%
Cumulative	30%
Detection within 3-5 years	40%
Cumulative	70%
Detection within 5-7 years	25%
Cumulative	95%
Detection within 7-10 years	3%
Cumulative	98%
Detection within 10-15 years	2%
Cumulative	100%

Similar analyses by architects and from overseas showed comparable results.

The recommended liability cap was attacked by some parties on the basis that it would reduce their ability to sue indefinitely. This argument was dismissed by the drafters of the legislation on the following grounds:

- The vast majority of defects becomes apparent within 10 years;
- After 10 years, many companies are no longer in existence (or are worth little);
- In many cases, after 10 years, it would be extremely difficult to mount a defence within reasonable cost constraints because documents will have been destroyed and staff involved

would not recall events, or would have left the practice or died; and
- Insurers would find it virtually impossible to quantify the risk, so the defendants would not be able to afford insurance cover.

According to the drafters of the legislation:

> "The irony of it is that the consumer would avail itself of more protection if a 10-year liability cap was introduced, as it would enable insurers to quantify risk; premiums would likely then be lower, professional indemnity insurance would return to favour and consumers would have financially viable defendants."[11]

With respect to "joint and several liability", the drafters of the legislation were cognizant of the need to limit the liability of local authorities and insured defendants to no more than their apportioned responsibility for the fault - as determined by the Building Appeals Board. The drafters indicated that:

> "Those primarily victimized were pecunious defendants, more often than not local councils and insured architects and engineers. Often the inclusion of a council defendant is motivated by the plaintiff's "streetwise" nous (knowledge) that irrespective of the financial viability of any of the other defendants, if liability can be attached to the council, even if it is nominal liability, the council will have to pay 100% of the award.
>
> ... Council officers have become particularly cautious in exercising their responsibilities and discretions, in order to minimize the prospect of litigation. This in turn causes delays in the approval process.
>
> Insurers have no option but to charge substantial premiums as they are cognizant of the potential liability of their clients for 100% of any given claim, irrespective of whether their defendant client may be only nominally liable.
>
> ... local authorities do not have "sufficiently broad shoulders" to bear the loss. Councils do not have freedom of choice in relation to functions they undertake, and neither do they have flexibility in setting fees which reflect the real costs of those activities or the cost of insuring against risks arising from it. In addition, a council is unable to determine its liability and debts by going into voluntary liquidation and starting again"[12].

With the establishment of limitations on liability, the drafters of the legislation set the stage for compulsory insurance coverage for building practitioners (to ensure that they could meet their share of liability). Without the 10-year cap and proportionate liability, it is unlikely that insurance would have been available to practitioners at a reasonable cost.

Adoption of the Reforms - a State by State Process

The Model Building Act was formulated through a consultative process during 1990-1991 and was published by the AUBRCC in 1991. This established the umbrella legislation under which each state would have uniformity in terms of both technical regulations (the BCA) and the administrative processes with respect to building regulation. The intention was that all states would eventually adopt the legislation and that building regulations would, as a result, become uniform across Australia. This did not occur - the current situation is a patchwork of differing regulatory regimes across the country.

The reforms have become known as the "Victorian model" due to the heavy involvement of state staff in the AUBRCC project[13], and the fact that the state adopted the reforms quickly. The Model Building Act was released for public comment in Victoria in February, 1992 with the intention of adoption. The process was interrupted when the Labor (left-of-centre) government which had initiated the process was replaced by a Liberal (right-of-centre)

government in an election in early 1992. The process had, however, been bi-partisan and the legislation was finally passed by the new government in late 1993, with proclamation in mid-1994 in order to allow the necessary supporting regulations and administrative changes to be implemented.

In fact, due to the change in government in Victoria, the Northern Territory became the first jurisdiction to adopt the reforms. Victoria had assisted the Northern Territory government in its reform program and its legislation is similar.

The other states are gradually moving towards adoption of these and other reforms; however, the process has been piecemeal. Regulation of building and development in the various states continues to evolve in response to pressures for regulatory reform and there are on-going initiatives aimed at harmonization of regulations among the states.

The pressure for regulatory reform has intensified - in part due to the signing of a Competition Principles Agreement between the Commonwealth and the states in 1994. The principles of this agreement were to:

- Limit the anti-competitive behaviour of firms;
- Reform regulation, which unjustifiably restricts competition;
- Reform the structure of public monopolies to facilitate competition;
- Provide third party access to facilities which are essential for competition;
- Restrain monopoly pricing behaviour; and
- Foster competitive neutrality between government and private business where they compete.

This initiative, plus pressures to harmonize regulations, are expected to lead to further movement towards regulatory reform and more standardized regulatory regimes in the states in the future.

3. The Australian Building Regulation Reforms

This section describes the Australian building regulation reforms in more detail. The Victorian building control system is used as the basis for discussing the reforms, since it bears the closest resemblance to the AUBRCC model. Where relevant, the differences in approach which have been adopted in other states are discussed as well.

3.1. Overview of the Building Regulation Reforms

As previewed in Section 2, the main elements of the building regulation reforms introduced in Victoria in the early 1990s were:

- **Limitations on liability for building practitioners** - the liability period for property damage resulting from defects in the design, construction, approval or inspection of buildings has been capped at 10 years. In addition to the 10-year cap, the doctrine of "joint and several" liability has been replaced with "proportionate" liability according the involvement of defendants - no party is required to cover more than their share of the judicial apportionment of damages. The 10-year cap does not extend to claims for personal injury or death which may result from building defects.
- **Privatization of building approvals and inspections** - building approvals may now be obtained from private sector building certifiers. This replaces the traditional monopoly of local government building officials in this area and has led to competition among private building certifiers and municipal building certifiers. Municipal building certifiers are also allowed to issue building approvals for projects outside of their local government area. Building certifiers examine plans to ensure that they conform to appropriate codes and standards and other regulations, issue building permits, carry out inspections (where necessary), and issue occupancy permits. When private sector building certifiers are used on a building job, the municipal role is essentially reduced to one of record-keeping of the final documents.
- **Compulsory registration of building practitioners** - persons who undertake the design, construction or demolition of buildings (including building certifiers and inspectors) are required to register annually with the Building Practitioners Board (a state-run body in Victoria) and receive a licence which allows them to undertake work anywhere in the state. There are a number of categories of building practitioners: building certifiers, inspectors, engineers, designers, commercial builders and residential builders (among others) - with varying qualifications and experience required for registration in each category. Evidence of a current insurance policy is also a requirement for registration. In Victoria, anyone who contracts to undertake building work for a building owner (either new work or renovations) which is valued at $5,000 or more is required to be registered with the Building Practitioners Board. Subcontractors to a builder or general contractor are not required to be registered.
- **Compulsory insurance for building practitioners** - building practitioners are required to carry insurance to cover defects in the building work. The type of insurance required depends on the specific profession of the practitioner. Home builders are generally required to have job-specific insurance coverage (similar to Canadian warranty coverage). The purpose of the compulsory insurance is to ensure that there are sufficient resources available to cover practitioners' shares of liabilities in the event of claims for damages.

These reforms were introduced in Victoria as a package - as was intended by the AUBRCC. The reforms constituted an integrated approach to building regulations which recognized that each part is dependent on other parts. For example, compulsory insurance of building certifiers was a critical element in the privatization of the building approvals function - to ensure that there would be sufficient funds to rectify any building defects resulting from the private certifiers' errors or omissions.

At the same time, limitations on liability were essential if the premiums for insurance coverage were to be reasonable. Registration and insurance for other types of building practitioners was necessary if there was to be justice under the change to proportionate liability (i.e. it is necessary to ensure that all defendants have the resources to pay their proportionate share of damages).

Following a description of the key role played by the Building Control Commission (BCC) in the operation of the Victoria regulation system, more details on the reforms and an assessment of how well they work in practice are provided later in this section.

The Building Control Commission

The BCC is a self-funding statutory body established in 1994 in accordance with the provisions of the Building Act of 1993. The Commissioner of the BCC reports to the Minister of Planning and Local Government. The BCC has approximately 60 staff and is funded by a fixed levy on building permits of 0.064% of the cost of construction ($64 on a $100,000 project).

The establishment of the BCC, separate from government, with a separate (user-pay) source of funding, was considered important by the designers of the Victorian system. It was intended as a demonstration to the industry that the BCC would operate under a distinct mandate without undue interference from the government of the day.

The key functions of the BCC include:

- Advice to the Minister regarding changes to the Building Act and building regulations;
- Administration of the Building Practitioners Board and coordination of the registration of building practitioners;
- Administration of the Building Appeals Board which, among other things, hears disputes arising from building control matters;
- Investigation of complaints against building practitioners; and
- Research and dissemination of information.

In relation to the reforms of building regulations, the two key functions of the BCC are the registration of building practitioners through the Building Practitioners Board (discussed later, in Section 3.4), and the operations of the Building Appeals Board - discussed next.

The Building Appeals Board

The BAP is an independent body established under the Building Act of 1993. Its members, appointed by the government for a period of up to three years, are drawn from building certifiers, architects, engineers, town planners, builders, solicitors, and people experienced in education, insurance and compensation matters. The Board has two main functions:

- To hear appeals and resolve disputes relating to building control; and
- To make determinations regarding building regulations.

Appeals to the Board are rehearings of decisions made by other bodies (e.g. the decision of a building certifier with respect to requirements for issuing a building permit). Applications to the Board seeking hearings in relation to appeals or disputes can be made by a variety of parties - including a building owner, a building certifier, the BCC itself, and the adjoining building owner. Hearings are held relatively quickly and determinations are generally made within a month of the application. There is a provision to hear urgent cases within 48 hours of an application.

All parties to a dispute may attend the hearing and present their case - within a non-judicial setting. The decision of the Board is final and binding. There are modest fees associated with making an application to the Board; generally all parties bear their own costs, regardless of whether the appeal succeeds or fails.

The second function (**determinations**) relates to applications from designers to affirm that a particular design of a building or an element of a building complies with the regulations. An application for a determination can also be made so that a particular regulation either does not apply, or applies with the modifications specified in the application. In its determinations, the Board will grant modifications only if it is satisfied that, in the particular circumstances, the provision is inappropriate and that a modification would be reasonable and not detrimental to the public interest.

In 1996, the Building Code of Australia was revised into a fully performance-based code - the new BCA was adopted by Victoria in 1997. Since then, the applications for determinations by the Building Appeals Board have declined since, with a performance-based code, designers have much more flexibility than under the previous prescriptive-based code.

The remainder of this section provides more details on each of the four major components of the building regulation reforms:

- Limitations on liability for building practitioners;
- Privatization of building approvals and inspections;
- Compulsory registration of building practitioners; and
- Compulsory insurance for building practitioners.

3.2. Limitations on Liability for Building Practitioners

As noted in Section 2, limitation of building practitioners' liability was a critical element of the building regulation reforms. Compared to the previous regime, the reforms limited liability in two ways:

- To the period ending at 10 years following the issuance of the occupancy permit; and
- To the proportion of their responsibility for the building claim - i.e. the doctrine of "joint and several liability" was abolished.

These were viewed as essential prerequisites in facilitating the provision of insurance coverage for building practitioners - another key element of the reforms (discussed in Section 3.5).

The 10-year cap on liability applies to property damage resulting from defects in the design, construction, approval and inspection of buildings. The conclusion, based on an analysis of when building defects typically become apparent, was that owners would not be greatly disadvantaged by a 10-year cap. The cap does not extend to claims for personal injury or death which may result from a building defect.

Compulsory insurance for building practitioners was the key trade-off in both the 10-year liability cap and the abolition of joint and several liability. While the introduction of proportionate liability was inherently fairer to the building practitioners (particularly to local authorities, which tended to be the "insurers of last resort" due to their "deep pockets"), it could have created difficulties for plaintiffs if those at fault did not have the resources to cover the damages. The requirement for compulsory insurance meant that the plaintiff had the guarantee of insured defendants (i.e. appropriate damages would be paid) at the same time as ensuring that no practitioners would be exposed for any more than their proportionate shares of responsibility for the damages.

3.3. Privatization of Building Approvals and Inspections

The removal of the monopoly powers of local authorities in building approvals and inspections was one of the most controversial aspects of the reforms. In most states in Australia, private sector building certifiers are now allowed to perform the functions previously undertaken only by building officials employed by local authorities[14]. Typically, private sector building certifiers are now in (often fierce) competition with local authority building officials, since builders and owners who are seeking building approvals now have a choice.

Local authorities have the option of withdrawing from offering building approvals; however, if they do, they must contract out the function. Options for local authorities in contracting out the building approvals function include: certifiers working for another council, a regional corporation comprised of several councils, or a designated private certifier.

Qualifications for Building Certifiers

Whether they are employed by local authorities or private companies, building certifiers are required to have the appropriate qualifications to undertake the approval and inspection functions. In addition, they are required to have the appropriate professional indemnity insurance or they are not allowed to practice - insurance is discussed below in Section 3.5.

At present, there are variations in the qualification requirements for building certifiers among the states. In Victoria, building certifiers must meet the qualifications established by the Building Practitioners Board - administered by the state-run BCC. In New South Wales, which is just in the process of introducing private certification, professional organizations will handle the accreditation of building certifiers - subject to satisfying the government that they have appropriate procedures and standards in place[15]. Though there are obvious similarities, there are differences in the qualification requirements for building certifiers in both of these states - as well as the other states with private certification.

These differences in qualification requirements are causing difficulties since, under the national Mutual Recognition policy[16], states must allow building certifiers to register in their state if they are accredited in another state. At present, the ABCB, in cooperation with the states, is working towards developing a national framework for accreditation criteria for building certifiers. In its preliminary work in this area, the ABCB proposes the following roles for government and professional bodies:

- **Government** - responsible for a national register of certifiers, as well as auditing, enforcement and registration procedures (to be handled by states); and
- **Professional bodies** - responsible for establishing the educational needs for certifiers and accrediting both courses and professionals.

The forthcoming development of a national framework for accreditation criteria seems likely to address the current problems associated with differing qualification requirements among the states. When the framework is in place, it appears that there will be three categories of building certifiers recognized across Australia (the appropriate titles for these categories have yet to be agreed upon):

- **Unlimited building certifier** - unrestricted ability to certify compliance with the BCA and other relevant legislation. This would require a degree and three years of practical experience.
- **Limited building certifier** - ability to certify compliance with the BCA and other relevant legislation for buildings up to 3 storeys and 2,000 square metres. This would require an advanced diploma and 2 years of practical experience.
- **Building inspector** - ability to undertake inspections of building works for compliance with the approved documentation and relevant legislation. This would require a diploma.

While the accreditation criteria establish the minimum requirements for building certifiers at each level, it is incumbent on the professional certifiers themselves to ensure they have the appropriate knowledge (and qualifications) for each building they certify. For example, if a complicated building with innovative systems (increasingly the

case with the new performance-based BCA) is beyond the expertise of a building certifier, it is incumbent on the certifier to obtain whatever outside expertise is required (e.g. engineers' certification for particular building elements) in order to ensure that the building complies with the BCA and all other relevant regulations.

The Building Certification Process

Typically, with private building certification, the process of obtaining the necessary approvals for building work have become substantially more user-friendly and less time-consuming for applicants. However, this appears mainly to be due to the beneficial effects of competition for building approvals - the actual processes required in securing a building approval do not appear to have changed significantly due to private certification.

The stages involved in the process of certification for a new building (whether by a private certifier or a certifier employed by a local authority) are as follows:

- **Appointment of the certifier** - the owner or his agent makes an application to a building certifier for a building permit. This is an important step since, once appointed, a certifier cannot be terminated without the written consent of the BCC (in Victoria). The clear intention here is to protect the certifier against undue influence from the owner.
- **Obtain all necessary documentation** - depending on the building, there may be aspects (e.g. engineering certificates and soils tests) which the certifier requires in order to ensure that the building meets the required building regulations[17]. Also, depending on the jurisdiction, providing the building meets specified requirements relating to setbacks, height and density, construction may proceed on an "as of right" basis; however, it is the responsibility of the certifier to ensure that either the building conforms to local planning regulations or the necessary approvals have been obtained from the local authority[18].
- **Review and comment on plans** - the certifier reviews the plans for conformance to the BCA and other relevant regulations, and provides comments back to the designer regarding necessary alterations to the plans.
- **Issuance of building permit** - providing the plans conform to the BCA and other regulations, and providing that the appropriate planning approvals are in place, the certifier can issue the building permit.
- **Inspections** - depending on the jurisdiction, inspections may be required in the course of construction. In Victoria, there are four mandatory inspections (foundations, steel work for the concrete slab, frame and final). These inspections may be undertaken by the certifier; however, more commonly they are undertaken by an inspector engaged by the certifier (building inspectors, as discussed above, are not required to have the same level of qualifications). In most states, local authorities typically are not involved in inspections of privately certified buildings; however, this is not always the case - the ACT, for example, conducts both plumbing and electrical inspections. In other states, plumbing inspections are often conducted by the water authorities.
- **Issuance of occupancy certificate** - following completion and the final inspection, the certifier issues an occupancy certificate for the building. The issuance of the occupancy certificate also triggers the commencement of the capped 10-year liability period (see Section 3.2) for building defects.

Throughout this process, the certifier is required to keep the local authority informed of progress - i.e. it is the responsibility of the building certifier to ensure that copies of the building permit and occupancy

certificate (as well as other appropriate documentation) are lodged with the local authority within a specified time frame. Failure to do so, and/or failure to comply with other responsibilities (as outlined above) may result in a certifier being brought before the Building Practitioners Board (in Victoria) with unpleasant consequences - including reprimands, fines, restrictions on practice or, ultimately, deregistration of the certifier.

The above generally describes the process in Victoria - other states follow a similar pattern, though there are differences in the details. In South Australia, for example, there have been no mandatory inspections since private certification was introduced in 1993 - however, this may change since there has apparently been a deterioration in the quality of construction[19]. In New South Wales, while there is no requirement for inspections, it is intended that certifiers will need to satisfy themselves that buildings have been appropriately constructed (through some method of inspections) since they will be responsible for issuing the occupancy certificate (called a "completion of building work certificate"). Queensland has mandatory inspections, similar to the Victorian system.

Benefits of Private Certification

In the view of everyone interviewed as part of this assignment, there is little question that private certification of buildings has been an enormous success in Victoria and other parts of Australia where it has been introduced. There have been inevitable teething problems; however, in the view of all of these observers, these have been more than balanced by the benefits.

In most states, local authorities continue to provide certification services in competition with the private secto[20]. However, the building departments are smaller since the workload is less, and many of the building officials who previously were employed by local authorities have left to set up private certifier practices. According to all of those interviewed, as a result of the competition from private certifiers, there has been a major change in the quality service offered by local authority building officials - compared to the services offered in the days before competition with private certifiers. Many local authorities are aggressively pursuing certification work both within their boundaries and in other jurisdictions - including work in other states. To get this work they must offer a service which is competitive - both in price and responsiveness to clients' needs.

In Victoria, where private certification has been in operation the longest, over 60% of total residential and non-residential building permits are issued by private certifiers. In terms of value of building permits, private certifiers account for roughly three-quarters of all permits issued. It appears that most applicants with larger (especially non-residential) jobs use private certifiers, while a higher proportion of those with smaller jobs (especially homeowners with additions and minor works) use local authority certifiers.

The benefits of private certification noted by various interviewees include:

- **Reductions in the time required for building approvals** - one of the most important benefits of private certification has been the improved service that has resulted from a competitive environment for building certification. Local authority building certifiers, faced with competition, have become much more responsive to the needs of their clients.

This is reflected in a variety of ways; however, the time required for approvals and inspections is one of the most significant. For example:

- **Building permits** - one builder (who still uses local authority building certifiers) indicated that when he needs a building permit, he calls up the local authority and they come and pick up the plans and typically issue a building permit within days. If it is a standard house and the permit is required very quickly, the certifier may actually undertake the review in the builder's office and issue the permit on the spot. All interviewees indicated that the timeframes involved in obtaining building approvals have shrunk significantly.
- **Inspections** - several builders (and certifiers) indicated that their inspectors are required to have cell phones so that they can respond to a request for inspections virtually immediately (including on weekends).

- **Competitive premiums for certification** - there is no unanimous view about whether private certification has reduced or increased the premiums for building approvals. This depends on the building types and the jurisdiction. According to some of the interviewees, some local authorities used to subsidize approvals and, according to some private certifiers, some still do (unfairly in their view). However, on balance, it appears that the costs have been reduced - particularly for volume home builders and large commercial projects. Also, it is clear that premiums now are very competitive. Depending on the building and builder, certifiers may offer "deals" for volume and/or a standard price for issuing permits for a particular design of house which may be replicated many times in different locations.

  As noted, premiums vary depending on the certifier and the specifics of the building and location. In general, according to observers, the cost of a building approval for a typical modest house in Victoria would be in the $300-$400 range (including the permit, four inspections and the occupancy certificate).

- **"Better quality" buildings** - private certification allows building designers to choose building certifiers (or other professionals) with appropriate background and credentials to certify whether particular innovative aspects of their buildings meet the appropriate regulations. This is in stark contrast to the previous situation where many local authority building officials (particularly those in smaller jurisdictions) would not have sufficient background knowledge to understand new methods or products - this, plus liability concerns, hampered the process of innovation.

  According to many of those interviewed as part of this assignment, private certification, in concert with the performance-based BCA, has resulted in significant improvements in the climate for innovation - with resulting benefits in terms of both building performance and the cost of construction and operation of new buildings.
- **Improved "project teams"** - for larger builders and developers (especially those involved in commercial and large-scale residential construction), particular building certifiers have become part of their "project team" for the design and development of new buildings. Rather than the (sometimes adversarial) approach whereby the design team operated totally separately from the certification function (performed by the local authority), privatization facilitates the involvement of the certifier in all stages of the project (including the early design stage) which ensures that the certifiers' expertise is more fully utilized and costly redesigns are minimized.

With interjurisdictional recognition of building certifiers, it is now possible for builders and developers to form "project teams" (including certifiers) who work well together for projects in different municipalities and states. This, of course, was not possible when local authorities had a monopoly on certification.

While authorities encourage the involvement of certifiers as part of the design team, they are required to be "third parties" to the process - they are not allowed to be in the direct employ of either the company which designed the building or the builder.

- **Greater transparency** - in the past, problems with respect to the building approvals process in general, or with approvals or inspections of particular buildings, could be hidden in the files of local authorities. Now, the process is much more transparent. According to those interviewed, if there are problems, they are reported and the appropriate actions are taken.

Testimony as to the benefits of private certification are provided through the results of a series of interviews with individuals and companies which had been issued with building permits by private sector building certifiers. The interviews were undertaken by an association of local authorities in Victoria in October 1997. A sampling of the responses included:

> "As a general rule, private certifiers are a bit more accessible and friendly although, due to competition, council certifiers are also tending to make themselves more available."
>
> "Private building certifiers are probably a bit quicker."
>
> "Since the new building controls were introduced, the council has been much easier to get along with."
>
> "The dual system is a good one, providing the client with more choice and options."
>
> "Council certifiers tend to be a bit bureaucratic and quibble about every detail."
>
> "Use a private certifier for all work because of both cost and service... problem with councils in the past was that the staff were inadequate for the purpose and there were long delays in issuing a permit."
>
> "4-5 years ago a permit had been approved by council but they later found the building did not have wheelchair access."
>
> "The dual system is good - the old system didn't work and had potential for corruption."

These observations were confirmed during the course of the interviews with builders (and others) in Australia which were conducted specifically for this assignment. While most interviewees did not believe that the new system is perfect, they were unanimous in their agreement that it was immeasurably superior to the old local authority monopoly.

Problems with the Building Approvals System

The most frequently cited problem with the system is that it does not go far enough - most observers believe that private certification should be extended to planning approvals. There is a perception that local authorities have become more restrictive in issuing planning approvals for new buildings since the introduction of private certification for building approvals.

Some buildings do not require planning approval - in Victoria, for example, an industry source estimated that roughly 80% of single-family houses received planning approvals "as of right". However, where local authority approval is required, this has become a significant roadblock for new development. In some areas, according to the housing industry, local authorities have (and use) the power to dictate subjective details such as colours, facades and roofing material (e.g. to keep within the "character of the neighbourhood") and this has resulted in delays and (in the view of many applicants) unnecessary changes in development plans. In some cases, it has been reported that local authorities are requiring detailed building plans as part of the documentation required for planning approvals - something which was not required prior to the introduction of private certification.

The need for private certifiers to approach local authorities in order to obtain the necessary planning approvals has apparently led to competitive difficulties in some jurisdictions. Discussions with private certifiers indicate that some local authorities apparently use their monopoly on issuing planning approvals to encourage builders and owners to use the local authority building certifier (rather than a private certifier). Incentives which can be offered by local authorities to use their certifiers rather than private certifiers include:

- Reduced planning fees if the local authority building certifier is used;
- Reduced time for receipt of planning approvals (which may otherwise take weeks); and
- More lenient treatment where planning requirements may be subject to interpretation.

The industry has been calling on state governments to allow more private certification of routine planning applications - thus removing the need for local authority approval in these cases. Indeed, states are moving in this direction; however, in many states, according to the housing industry, progress has been slow[21].

Problems with private certification of building approvals which were identified in the course of the investigations tend to relate to concerns about private certifiers "cutting corners" and, perhaps, being less fastidious than the local authority certifiers who previously had a more independent (some would say "adversarial") relationship with the client. The intense competition which now prevails among certifiers has lowered premiums to the point where some observers believe that it is not possible for certifiers to make a reasonable income without cutting corners in their review of plans and/or inspections. Examples include:

- **Lack of necessary documentation** - with the performance-based BCA, designers (and certifiers) have more latitude to approve innovations. While certifiers are supposed to provide documentation which substantiates performance as part of the approval, there have apparently been cases where certifiers have either not undertaken such a review, or they have not provided the necessary documentation.
- **Lack of necessary planning approvals** - there have been instances where certifiers have not obtained the appropriate planning approvals prior to issuing building permits.
- **Inappropriate demolitions** - there have been some highly publicized instances in Victoria where permits were issued for the demolition of buildings which were subsequently deemed to be of historic value. This has led to increased education of building certifiers regarding the appropriate practices for preservation of historic buildings. Also, municipalities in Victoria are in the process of identifying the buildings which are considered in need of preservation - rather than deal with them subjectively as applications for demolition are received.
- **Inadequate inspections** - there has apparently been an increase in substandard building work in some jurisdictions, particularly in states where inspections are not mandatory. In general, the intention in these states is that certifiers will still undertake sufficient inspections to ensure that buildings are being constructed properly; however, this apparently is not always done. This has significant implications, not only for the overall success of the reforms, but also in terms of details such as the appropriate premium for insurers to charge practitioners - risks will presumably be greater where there are fewer inspections.
- **Communication with local authorities** - private certifiers have not always lodged the appropriate documentation (e.g. copies of the building permit) with local authorities within the prescribed time frames. This is important since councils must monitor whether construction projects are legal.
- **Policing and discipline** - there is apparently a concern among insurers that states are not using their powers to police (and discipline)

building practitioners to the extent they should - in order to curb abuses of the regulations. In some cases, according to experts, the fines and reprimands received by building practitioners who have acted illegally (e.g. started a building without a permit, etc.) are little more than a "licence to bypass the system".

- Ethical issues - concerns have been expressed about the potential for ethical problems with building certifiers being part of the "project team" for developments, rather than acting as an independent "third party". This can be exacerbated by the practice where the builder often engages the certifier who therefore may see the builder as the client. In part, such concerns arise from those who do not understand the professional relationship between a certifier and the rest of the team though, clearly, there is the potential for collusion on the part of corrupt professionals. However, it is important to understand that corruption is not restricted to private sector certifiers - according to observers, there was a serious problem with corruption in the old local authority monopolies prior to the introduction of private certification.

None of these problems appear to be insurmountable - nor do they necessarily relate solely to the introduction of private certification. In response to some of the concerns which have been raised in Victoria, the BCC is stepping up audits to deal with some of these issues - both complaint-driven audits and random audits. These, plus severe penalties for inappropriate practices, appear likely to be sufficient to deal with most of the problems.

In the course of the investigations for this report, knowledgeable observers identified two other initiatives which could assist in clearing up the perceived conflicts faced by certifiers:

- The regulations should more clearly state that the principal responsibility of the building certifier is to uphold the law and public safety - not to cater to the needs of the client. This could be achieved by a clear clause to this effect in the regulations (and on the forms which are signed by certifiers, as well as engineers providing supporting material).
- It should be a requirement that the building certifier be engaged (and paid) directly by the owner, not by an agent of the owner (such as the builder). It is currently common practice for the builder to engage the certifier - who may, therefore, see the builder as the client rather than the owner. Such an arrangement would more clearly establish the role of the certifier in protecting the owner against poor building design or practices. This is not intended to detract from the important role of the certifier in the project team; however, the certifier should not be subservient to the team.

In conclusion, according to everyone interviewed as part of this assignment, the Australian experience with the private certification of building approvals has been very positive. Potential improvements to the system would be more in the nature of fine-tuning than substantial change.

3.4. Compulsory Registration of Building Practitioners

In all states which have introduced private certification of building approvals, there is a requirement for registration of building certifiers - either with a state-run body (e.g. Victoria and Queensland), or through appropriately accredited industry-run organizations (e.g. NSW and ACT). However, for other types of building practitioners (e.g. designers, builders, contractors, and subcontractors), there are substantial differences among the states.

Victoria - Building Practitioners Board

The BPB was established by the Victorian Building Act (1993) to administer the building practitioner registration system. Under the Building Act, anyone who undertakes the design, construction or demolition of buildings requiring a building permit (typically any work worth more than $5,000) is required to be registered as a building practitioner with the BPB - i.e. building certifiers, inspectors, engineers, quantity surveyors, and draftspeople,

as well as builders and demolishers. Architects are registered separately by the Architects Registration Board which operates under separate legislation; however, architects are deemed to be building practitioners for the purposes of the Building Act.

The categories of building practitioner covered by the BPB include:

- Building surveyors (building certifiers are called building surveyors in Victoria)
- Building inspectors
- Quantity surveyors
- Engineers (separate categories for civil, mechanical and electrical)
- Draftspeople (separate categories for three types of building design - architectural, interior and services)
- Commercial builders (separate categories for structural and non-structural)
- Domestic builders (separate categories for unlimited, limited and manager)
- Demolishers (separate categories for low-rise, medium-rise and unlimited)
- Erector of temporary structures

To be registered with the BPB, building practitioners must have appropriate qualifications (which, of course, vary for each type of practitioner) as well as insurance. Building certifiers, inspectors, quantity surveyors, draftspeople, engineers and builders (commercial and some classes of domestic) are generally required to hold formal qualifications as well as appropriate experience. For builders applying for registration with the BPB, appropriate courses have been developed by industry and education groups; however, these are relatively recent and most builders have been "grandfathered" into the system without possessing formal qualifications.

For domestic builders (residential builders in Canadian parlance), the two sub-categories include:

- Domestic builder (unlimited) - registrants must have adequate knowledge and experience to carry out, manage or arrange to carry out all components of domestic building work; and
- Domestic builder (limited) - registrants must have adequate knowledge and experience to carry out, manage or arrange to carry out the components of domestic building work specified in the certificate. Carpentry work, site works, door and window replacement, brickwork, roofing, heating and ventilation, paving and landscaping, and bathroom and kitchen renovations are examples of the types of certificates issued to (limited) domestic builders.

Subcontractors are not required to be registered as building practitioners - except if they engage in work directly for a building owner, and the work is valued at $5,000 or more. Since they are not registered as practitioners, the insurance requirements do not apply to subcontractors - they are considered to be the responsibility of the builder and their work is covered by the builder's insurance. While subcontractors are not required to have insurance, the possession of insurance would presumably be a consideration in the selection of subcontractors by builders.

Only individuals can be registered as building practitioners. Any company which seeks to build in Victoria must have at least one registered building practitioner (of the appropriate type) as a partner or director. Registration of individuals rather than companies is one mechanism to limit the incidence of so-called "phoenix companies" - cases where unscrupulous practitioners could reopen under another name after closing a company which had run into trouble. Under this system, the practitioner cannot reappear under another corporate name unless the BPB is satisfied that the practitioner has acted appropriately - or has faced the appropriate penalties[22].

When the reforms were introduced in 1994, registration was required first for building certifiers and inspectors. Subsequently, registration was extended to include the other categories of building practitioners.

Domestic builders were not required to register with the BPB until 1996. Another public body, the Housing Guarantee Fund (HGF) had, prior to the reforms, been responsible for registering builders and providing warranty coverage for new homes[23]. In 1996, the HGF was abolished - its registration function was taken over by the BPB, and private insurance took over the warranty function. All builders which had been registered with the HGF were automatically accepted as having the appropriate qualifications for registration by the BPB[24].

Complaints about the professional conduct of building practitioners can be lodged with the BCC and, depending on the circumstances, may result in an inquiry by the BPB, and perhaps a hearing before the Building Appeals Board. If considered appropriate, the BPB may impose penalties - including fines, reprimands, and cancellation or suspension of registration. In some instances, such as failure to register, issuing an inappropriate occupancy or building permit, or approval of non-complying work, cases may be referred for court prosecution.

According to some observers, a flaw in the Victorian system is that registration, auditing, hearing disputes and hearing appeals are all housed within the BCC. According to this view, it would be more sensible to separate the functions of registration from the hearing of disputes and appeals.

Any complaints against building practitioners can be referred to the BPB - which, in turn, may refer them to the Building Appeals Board for a hearing and determination. However, typically, this is restricted to problems associated with technical or professional issues. Contractual disputes between builders and owners are heard by the Victorian Civil and Administrative Tribunal (VCAT) which has a Domestic Building Tribunal established to resolve such disputes - hopefully through conciliation or mediation, if not through a hearing before the Tribunal.

Varying Building Practitioner Requirements in Other States

There are variations among the states in both the coverage and requirements for registration of building practitioners. In most other states which have introduced the reforms, registration requirements do not extend beyond domestic builders and building certifiers. In New South Wales, it seems likely that registration will extend to other practitioners; however, the process in NSW is still in its infancy - private certification has just been introduced and, as noted in Section 3.3, the registration system for building certifiers is still being worked out. Domestic builders in NSW continue to be licenced under a separate scheme in the Department of Fair Trading.

As important as the coverage of the registration system, the requirements for registration of particular types of practitioners, in terms of both technical and other qualifications, also varies from state to state. In all states, there are prescribed technical requirements in terms of the qualifications and experience necessary to obtain a licence for each type of practitioner to be registered. However, as discussed with respect to building certifiers (Section 3.3), there is no standard national set of qualifications for particular types of practitioners. States are endeavouring to standardize these requirements through Builders Licencing Australia (BLA - a national organization established for this purpose) and progress is being made in this regard.

In Queensland, the requirements for building practitioners to obtain a licence extend beyond technical qualifications to include management skills and financial capacity. While the other states have tended to regard these as issues which should be dealt with by the insurance industry (insurance is compulsory for practitioners to obtain a licence), in Queensland, the Building Services Authority (BSA) considers this to be a key aspect of licencing. According to the BSA, registration of building

practitioners should include consideration of an applicant's financial and business management capabilities because:

- The building industry needs improved business skills and better financial management. However, the focus of insurance is on consumer protection - not industry development. The BSA believes that licencing authorities (not insurers) are better placed to address this endemic industry problem. Insurers are more likely to focus on risk management than fostering improvements in financial or management skills.
- Regulation by the insurance companies is less transparent (and possibly less fair) than a more open system of financial and management assessment which would be operated by the licencing authorities. Insurers could implement unreasonable requirements in order to minimize losses.

Accordingly, the BSA has developed mandatory criteria for builders' licencing which go beyond technical qualifications and experience. At this point, no other state includes such requirements in their licencing of building practitioners[25]. In general, the housing industry associations do not support the use of financial or managerial criteria in establishing the requirements for registration of practitioners - this is viewed as a consumer protection issue which can be adequately covered through the requirement for insurance. The insurance industry, on the other hand, appears to support the inclusion of financial and managerial criteria in licencing - in their view, this would assist them in minimizing risk, and would be reflected in lower premiums.

Owner-Builders

Owner-builders are not generally required to be registered as building practitioners unless they are in the business of building. However, in some (but not all) states, restrictions have been placed on the activities of owner-builders to ensure that they are indeed legitimately building for their own occupancy and not using owner-builder status as a means of avoiding the regulations which apply to domestic builders. In Victoria, for example:

- Owner-builders cannot sell more than one home every five years;
- Owner-builders who sell their homes within 6 1/2 years of the issuance of the occupancy permit (the statutory minimum warranty period) are required to provide a certificate of insurance to the purchaser for the remainder of the period; and
- Owner-builders who sell their homes within the 6 1/2 year period are also required to provide a report on the condition of the home (prepared by a suitably qualified person - e.g. an architect or a building inspector).

Anecdotal evidence indicates that there has been a decline in the number of bogus owner-builders in Victoria[26]. However, according to observers, unregistered builders are circumventing the system by having the owner apply for the building permit as an owner-builder but not do the work himself - this is carried out illegally (underground) by the unregistered builder. This has led to calls from the industry associations for requirements that owner-builders display some level of competence with respect to building work (i.e. through a course or examination) before a building permit would be issued.

Dispute-Resolution

In general, the state registration organizations are not responsible for the resolution of disputes between the various parties in a building project - unless the dispute pertains to technical issues. In Victoria, for example, the Building Appeals Board typically hears these types of disputes, while contractual disputes are referred to the Domestic Building Tribunal at VCAT - or are resolved through the courts.

Dispute-resolution procedures vary from state to state; however, the procedures in South Australia have been identified by the national Housing Industry Association (HIA) as providing a model which is recommended for other states. There is no one piece of legislation which deals with the issue of building disputes; however, the regulations included with the South Australian Building Work Contracting Act (1995) contains the following advice for consumers who have a dispute with their building contractor:

> "First, talk to your building work contractor. Many potentially serious disputes can be avoided by good communication between building owner and contractor. Your contract may have clauses relevant to dispute resolution which may assist both parties in resolving the dispute.
>
> If that does not work, you may need independent advice. You may wish to seek legal advice, or the advice of the Office of Consumer and Business Affairs. Some disputes can be resolved by negotiation. Others can only be resolved by legal proceedings, whether before the courts or by private arbitration as provided in many building contracts.
>
> Before commencing any legal action over building work, you should seek advice from a lawyer or from the Office of Consumer and Business Affairs"[27].

The HIA standard "plain language" contract contains provisions for alternative methods of dispute resolution which are intended to resolve disputes with a minimum of cost and delay. The contract includes a two-level option for dispute resolution:

- The first level is conciliation;
- If that is unsuccessful, disputes go to dispute reference or arbitration.

Conciliation has proven to be a practical way of settling most disputes that would otherwise be dealt with through more formal and expensive means.

The mechanism specified in the standard HIA contract includes the following steps:

- The person wishing to have a matter dealt with under Conciliation issues a notice advising the other party that there is a dispute and that a request is being made for the appointment of a Conciliator;
- The person starting the process contacts the HIA in writing to request a Conciliation, including the nominal fee of $200;
- The HIA determines the nature of the dispute and appoints a suitably qualified and experienced Conciliator (typically a member of the Institute of Arbitrators);
- The Conciliator contacts both parties to arrange a mutually agreed time and place for a meeting;
- The Conciliation meeting takes place and, if agreement is reached, the Conciliator writes a simple agreement which becomes binding once both parties have signed.

If the Conciliation is unsuccessful, the parties are free to pursue other avenues. The recommended avenue is Dispute Reference. Dispute Reference is distinct from a similar procedure termed Arbitration in that it excludes lawyers from the hearing (lawyers may advise the parties but they cannot attend Dispute Reference hearings) - this has the practical effect of tending to keep costs lower than an Arbitration case where lawyers present their clients' case.

Dispute Reference has the following steps:

- The person initiating the process gives written notice to the other party calling them to a Dispute Reference;
- A copy of the notice (and a $300 fee) is sent to the HIA;
- The HIA appoints a referee (typically a member of the Institute of Arbitrators) and advises both parties of the appointment;
- The referee commences the process and considers the dispute (including examination of documents, attendance at meetings where the parties to the dispute will present their sides and, if necessary, appoint consultants to advise on specific matters);

- The referee decides the dispute based on "justice and fairness";
- The referee's costs are split equally between the parties.

Arbitration proceeds in a similar manner, except that lawyers may present their client's case - this is usually reserved for major disputes.

These procedures are specified in the standard HIA contract and either party can start the process in the event of a dispute.

Dispute resolution procedures vary from state to state. Often the process is confusing, expensive and time-consuming. In all cases, there are efforts to resolve the dispute through conciliation and mediation; however, this is only successful in some cases and, inevitably, many cases go to the courts.

3.5. Compulsory Insurance for Building Practitioners

In Victoria, all building practitioners are required to have insurance coverage as a condition of registration. The other states have varying requirements with respect to insurance coverage. Other than for domestic builders, for which all states require insurance coverage, requirements with respect to insurance in the other states represent a patchwork of differing practices and requirements. Even for domestic builders, there is a great deal of variation with respect to the insurance required among the states. Various organizations (including the ABCB and BLA) are endeavouring to bring a degree of standardization to the insurance requirements for building practitioners in the various states.

Types of Insurance Coverage

Two specific types of insurance are of particular interest in this discussion: [28]

- Professional indemnity insurance; and
- Warranty insurance.

Professional indemnity insurance provides coverage for professionals such as building certifiers, engineers and architects for negligence, errors or omissions in the conduct of their business. Typically, professional indemnity policies operate on a claims made basis - i.e. they cover claims which occur during the period when the policy is in force, regardless of when the actual negligence occurred. Normally, these policies are in effect for a one-year period, following which they must be renegotiated. Because the policies are annual, but only cover claims made during the period when the policy is in effect, without a specific provision for claims made in a later year when the professional may not have insurance (e.g. the professional may have retired or ceased business), the insurance would no longer be in force. To guard against this, building registration organizations require professionals to obtain "run-off" insurance to cover any claims made in the future.

Warranty insurance typically applies to domestic building work - either new homes or renovations. There are two alternative forms of warranty insurance:

- **Job-specific insurance** - similar to Canadian-style warranty coverage. However, unlike Canada, there are no non-profit warranty providers in Australia - in most states, warranty coverage for domestic builders is provided through private insurance companies. Insurance is purchased by the builder to cover the building work. Coverage typically applies from the date of completion of construction for 5-7 years (depending on the state). The insurance is issued to the purchaser or owner of the building and is attached to the building - so it continues whether the building is subsequently resold or not.
- **Annual insurance** - similar to professional indemnity insurance. The policy is issued to the builder on an annual basis and coverage is extended, on a claims made basis, into the future - thereby requiring run-off cover similar to professional indemnity insurance.

In all states except NSW (and, prior to 1998, Victoria), job-specific coverage is required for domestic building work. Prior to Victoria's change to requiring job-specific cover (after several years of allowing either), there was a considerable debate regarding the merits of the two approaches. This debate is discussed in more detail below.

Run-off cover is critical to the continued coverage of those with professional indemnity types of insurance. It is required that professional indemnity insurance have automatic run-off cover - i.e. it is not necessary for practitioners to continue to pay the insurance premiums following retirement or cessation of practicing. The run-off cover is provided automatically by the insurance company with which the practitioner had the last professional indemnity policy - as long as the insurance scheme is in operation. The theory is that the premium pool from other practitioners who continue to take out professional indemnity policies will be sufficiently large to cover the liabilities inherent in the run-off cover.

Warranty Coverage Versus Annual Coverage for Domestic Builders

When the public HGF scheme was terminated in 1996 and domestic builders were included in the Victorian reforms, insurance remained compulsory (though it was offered through private companies rather than a public body). Builders had the option of either job-specific warranty type cover or annual professional indemnity type of insurance. The choice was up to the builder and there was a considerable debate about the relative merits of the two types of insurance.

On the one hand, advocates of annual cover believed that such insurance would be less expensive in the long-term, and also that it was consistent with the types of policies prescribed for other types of building practitioners.

On the other hand, advocates of job-specific cover argued that, with annual cover, there is not adequate assurance that the insured will be covered for more than one year - the policies are intended to be renewed; however, there are practical difficulties in ensuring that this actually occurs. Other advantages of job-specific cover include:

- Job-specific insurance is in the name of the owner and, therefore, provides easy access for the owner to the insurer in the event of claims. With annual cover, the builder may have switched to another company in subsequent years so the owner may have difficulty accessing the insurance.
- Job-specific insurance has a greater capacity to protect consumers and the industry from builder failures because insurers have the ability to cancel the eligibility of recalcitrant builders. Annual insurance does not have this flexibility since builders can continue to trade until the annual policy comes to a end. With job-specific cover, the insurer is able to refuse to provide cover for additional jobs if problems arise - e.g. if the builder takes on more work than can reasonably be managed, if progress payment anomalies arise, if industry feedback or consumer complaints lead to investigations which indicate the builder is encountering difficulties, etc.

In Victoria, the debate ended with a requirement for job-specific insurance for domestic builders - annual cover is no longer an option. While it seems likely that most of the apparent difficulties with annual cover could have been addressed through better procedures (e.g. annual cover is still the approach used for other types of building practitioners), given the additional burden of consumer protection necessary in domestic building (compared to commercial building), it seems sensible to keep the insurance procedures as simple and straightforward as possible. In this regard, job-specific warranty type coverage appears superior to annual cover (where consumers are not the designated beneficiaries and continued coverage is open to some question).

Insurance Requirements in Victoria

As noted, Victoria has the most comprehensive insurance requirements for building practitioners of any of the states in Australia. It is a requirement for registration of building practitioners with the Victorian BPB that they have appropriate insurance coverage - otherwise they are not allowed to practice in Victoria.

There are variations in the types of insurance which are required for the registration of different types of building practitioners in Victoria:

- For professionals such as building certifiers, inspectors, architects, engineers and designers, professional indemnity insurance with automatic run-off cover for 10 years is required[29].
- For commercial builders, a form of indemnity insurance, called structural defects insurance, is required - with run-off cover for 10 years. This covers the builder in the event of defective or faulty workmanship and/or defective materials.
- For domestic builders, job-specific warranty coverage is required. As discussed, this is a relatively recent change from the original plan which allowed domestic builders the option of annual (indemnity-type) insurance or job-specific warranty type of insurance. It is a requirement that the insurance coverage be for a minimum of 6 1/2 years. As with the indemnity insurance for professionals and commercial builders, the insurance is offered by private companies.

  As a group, professionals have traditionally carried professional indemnity insurance so the coverage in their case is fairly straightforward. However, the imposition of automatic run-off cover was an innovation in the Victorian reforms.

For commercial builders, insurance is required to cover structural defects only - it was judged that a comprehensive defects policy (as is required for domestic builders) would have resulted in unacceptable additional costs to the industry.

Also, in contrast to home owners, the owners of commercial buildings are considered to be more knowledgeable regarding risks - and better able to protect themselves through their selection of a contractor and in their contract negotiations. Since the required insurance for commercial builders relates only to structural defects, some commercial builders (e.g. those building internal partitions, etc.) are not required to have insurance.

For domestic builders, the insurance must indemnify the building owner from loss or damage resulting from defective building work, failure to maintain the standard or quality of work specified in the contract, and non-completion of the work due to the death, insolvency or disappearance of the builder. Insurance is required for all domestic builders (both limited and unlimited); however, limited builders (mainly trades) are only required to insure work where they have a contract directly with the owner. Where the trade is working under a contract to another builder, that builder carries the insurance for the whole job.

To limit frivolous claims, the legislation allows warranty insurance coverage in Victoria to require the homeowner to contribute an increasing share of the cost of claims in the later years of a policy. The schedule of required homeowner contributions to claims is as follows:

• First 3 months	No homeowner contribution required
• 3-12 months	For claims over $500, no homeowner contribution required
• 12 months-3 years	Homeowner contribution of first $500
• 3-5 years	Homeowner contribution of first $750
• Over 5 years	Homeowner contribution of first $1,000

The Victorian legislation does not dictate how claims are to be settled. In the past, apparently, many building defect claims were settled through

simple monetary payments - without requiring that the work actually be undertaken. In the view of some observers, such practices led to an unhealthy culture among consumers and, as a result, many insurers have adopted a policy of requiring that building defects be corrected - rather than settling through a monetary award.

Warranty Period Less Than the Liability Period for Builders

The 6 1/2 year minimum coverage for job-specific warranty coverage in Victoria is less than the 10-year liability period for building work. In part, this is a legacy of the fact that, prior to the introduction of the reforms, the publicly-run warranty coverage for domestic buildings ran for 6 1/2 years and that is the period which has been adopted under the new arrangements.

At the time when the reforms were introduced, there were concerns that compelling private insurers to guarantee cover for a longer period (i.e. 10 years) might have restricted competition in the insurance industry, raised premiums for warranty insurance and/or restricted coverage to fewer builders (i.e. those considered to be excellent risks). There has apparently been a considerable debate about whether the differences in the warranty period and liability period are appropriate; however, as yet, there have been no changes in this period. In other states, the warranty coverage varies from 5 to 7 years, so Victoria is not alone in this regard.

In discussions at an interview for this assignment, officials at Home Owners Warranty (HOW), the privately-run insurance arm of the HIA, identified the following objections to extending the period of coverage for home warranty in Victoria from the current 6 1/2 years to 10 years:

- **Lack of demonstrated need** - according to HOW, the experience in the industry is that almost all claims relating to faulty workmanship in home building arise in the months immediately following the signing of the contract. Also, one of the major sources of claims (non-completion of the work) occurs before the building is even completed. HOW also indicates that there has been no call from consumer bodies, consumers, fair trading bodies or other interested parties regarding extension of the warranty period which applies around Australia.
- **Higher premiums would result** - increasing the warranty period from 6 1/2 to 10 years (a 50% increase) would inevitably expose the insurers to greater perceived risk, which will be reflected in higher premiums.
- **Risk of insurer withdrawal** - HOW points out that insurers have an aversion to "long-tail" business because they have difficulty assessing the risks. They believe that some insurers could exit the market if the tail cover was extended.
- **National consistency** - the statutory warranty periods in the other states all are in the 5-7 year range.

HOW points to the need for a balance to be struck between consumer protection on the one hand, and the need for liability closure for insurers on the other. They believe extension of the statutory warranty period beyond 6 1/2 years would upset the balance - with negative results for builders, consumers and insurers.

It should be noted that, in the event of defects being uncovered during the 3 1/2 years between the expiry of the warranty coverage and the end of the 10-year liability period, owners still have recourse to the builder. This, of course, presumes that the builder is still in business at that point; however, it is instructive to point out that, with the previous state-run HGF warranty coverage, consumers would have had to exercise the same option (recourse to the builder) following the termination of the 6 1/2 year warranty coverage period. The reforms have not been in operation for a sufficient period for the difference between the 6 1/2 year warranty and the 10-year liability cap to present difficulties - as noted, domestic builders have only been included in the new building control system since 1996. Any difficulties will not start to appear for another 3-4 years as the first dwellings emerge from their warranty coverage period.

The Cost of Insurance

The costs of obtaining insurance vary by type of coverage. For domestic building work, the HOW insurance scheme offered through the HIA accounts for a very large share of the market[30]. The premium schedule for HIA warranty insurance (either new dwellings or renovations) in Victoria in early 1999 was as follows (for HIA members, others pay roughly 15% more):

Home improvements up to $15,000	$95
$15,001-$20,000	$191
$20,001-$30,000	$206
$30,001-$50,000	$235
$50,001-$70,000	$261
$70,001-$100,000	$300
$100,001-$150,000	$366
$150,001-$200,000	$431
$200,001-$250,000	$496
$250,001-$300,000	$531
$300,001 + roughly	0.15%

Builders with good track records (and/or solid financial statements) receive discounts from this premium schedule - discounts range up to 45%. If builders want to extend insurance coverage for the full 10-year liability period, the additional premium from the HIA scheme is roughly $150, on average.

For professional indemnity insurance (i.e. the coverage for architects, certifiers, etc.), the premiums would vary depending on the circumstances of the insured. Anecdotally, experts in the insurance industry indicate that premiums are currently well below the long-term sustainable level due to intense competition for market share. The expectation is that premiums will rise significantly (2-3 times their current level) as the market matures. Such an increase in premiums also seems sensible given the fact that the amount of work covered by policies is increasing each year - i.e. under the claims-made system, the insurance in operation in a particular year covers all work undertaken by the practitioner in previous years as well. The backlog of work to be covered will therefore increase annually until the 10-year liability cap for work is reached - for the earliest members of the Victorian system, this does not occur until 2004.

3.6. Sum-Up - Variations in the Reforms by State

As is clear from the above discussion, the "Australian building reforms" are not reflected in a common set of initiatives adopted by all states. There are significant differences in the building regulations in the various Australian states. However, these regulations are gradually being reformed towards the Model Building Act which was recommended in 1991 by the AUBRCC - and which was adopted most closely by the state of Victoria in 1993.

The latest state to embark on the reforms is the largest state in Australia - New South Wales. At this point, NSW has only just commenced the reforms - it has established a 10-year cap and proportionate liability for building work; however, it is still in the process of introducing private certification. It has departed somewhat from the Victorian model - it will not have an equivalent organization to Victoria's Building Control Commission - and it will be interesting to examine its experience with this slightly different model for regulation.

With the exception of Tasmania and Western Australia, the other states have embarked on some of the reforms. However, they appear less convinced (than Victoria and NSW) of the efficacy of the reforms as a package. The fact that insurance is only compulsory for building certifiers and domestic builders in some states is evidence that they have not yet "bought" the full reform. Similarly, the continuation of a state-run warranty program in Queensland, and continued public inspections of plumbing and electricity in the ACT, indicate that there is not yet a complete trust in the private sector to deliver the benefits promised by the Model Building Act.

It seems likely, however, that, over time, the building regulations for the various states will become more similar - and that they will increasingly move towards the Victorian model. While they will likely continue to differ in terms of details, such as whether to have a BCC or decentralized authority, they will likely come closer in terms of the broad regulations such as private certification of buildings (and extensions to include some planning matters), as well as registration and insurance requirements.

4. Overall Assessment and Lessons for Canada

There is little doubt in the minds of any of those interviewed in the process of this assignment that the building regulation reforms introduced in the state of Victoria have been a great success. Private certification has resulted in reduced timeframes for obtaining building approvals and, in combination with the performance-based BCA, enhanced innovation in construction. Compulsory registration and insurance for building practitioners can be expected to lead to a more professional building industry - particularly as new building practitioners (with appropriate qualifications) gradually replace the practitioners who were registered through "grandfathering". The provision of a straightforward, fair dispute resolution process has greatly simplified and reduced the costs associated with building disputes. Liability capping and proportional liability have created an environment where insurance companies are prepared to offer insurance for building practitioners at competitive premiums. Compulsory insurance, plus the liability reforms, ensure that all parties to the process (building owners, certifiers, builders and local authorities) are treated fairly.

The building regulation reforms introduced in Victoria are a package - the performance of each part is dependent on other parts. The interdependence of the various initiatives was recognized (and emphasized) by the AUBRCC in drafting the Model Building Regulations in 1991. In adopting the full package, Victoria recognized this. Other states have not adopted all aspects of the package - as a result, they have not enjoyed the same level of benefits.

The Victorian model is by no means perfect. As discussed in earlier sections of this report, there are aspects that could be improved. Better monitoring and education of building practitioners appears necessary. Better integration of building and planning approvals (and firmer steps towards private certification of planning) would greatly streamline and simplify the overall development process. Some may also question whether it is essential to centralize all functions (including registration of building practitioners) in a public organization such as the Building Control Commission - or whether the more decentralized approach which appears to be underway in the (much delayed) introduction of the reforms in New South Wales may be more appropriate.

However, clearly, these are relatively minor concerns. The Victorians appear to have gotten most of it right. No one in the state is suggesting major changes in what has emerged as the obvious model for the rest of the country to follow. Builders, certifiers, local authorities and building owners all seem generally satisfied with the new system and look forward to further initiatives to address the concerns that remain.

Lessons for Canada

Canada faces many of the same challenges which stimulated interest in the reforms of building regulations in Australia. Seemingly unlimited potential liabilities are a major concern to everyone involved in building - in particular, municipalities which, with their "deep pockets" are frequently the main targets in building disputes. Adequate consumer protection is a major concern - particularly for home buyers. The need for increased professionalism in the building industry is evident. There are concerns about the lengthy building approvals process and the costs of this process - not only in terms of dollars and delays, but also in the effect which "risk-averse" municipal building officials have on innovations in building.

When faced with these very real and important challenges, the Australians mounted a national effort (funded jointly by the federal government and the states) to seek a common set of answers to deal with the challenges. Many of the states did not follow through with the reforms of building regulations recommended by the AUBRCC. However, the reforms clearly have been successful in Victoria where the full package was adopted.

There are clear advantages for the building sector through the types of reforms of building regulations which have been adopted in Australia:

- Companies and individuals involved in the building industry benefit from liability reform and insurance protection;
- The building industry benefits through a more transparent and competitive building approvals process, a registration system which encourages increased professionalism for those in the industry, an efficient dispute-resolution process, and enhanced prospects for innovation;
- Municipalities benefit by no longer being threatened with being "insurers of last resort" in the event of building defects;
- Insurers are able to provide insurance coverage at competitive rates through a combination of the liability reforms and the registration system which promotes professional practices among building practitioners;
- Consumers benefit through an efficient and accountable system which promotes innovation (and hence lower costs) while also providing protection against building defects.

Canada has a lot to learn from the Australian experience - not only in the specifics of the reforms (which themselves appear extremely attractive), but also in the process through which the Model Building Regulations were formulated. As in Australia, Canada's federal government is not constitutionally responsible for building regulation; however, the federal government has a major interest in minimizing economic inefficiencies and assisting the provinces in reaching a common means of dealing with similar challenges. The federal/provincial process used to formulate the Model National Building Code is clearly one which could be used in promoting a national approach to building regulation.

Indeed, it was the forerunner of the ABCB that spearheaded the development of the Model Building Regulations in Australia. It is interesting to note that unlike Canada, which had its first National Building Code in 1941, Australia came late to a federal/provincial approach to building regulations - the first BCA was adopted in 1987. However, also unlike Canada, Australia did not restrict federal/provincial cooperation in this area only to the technical aspects of building. The Australian model building regulation reforms were a result of this broader view of the benefits of national building regulations.

In Canada, we need to look seriously at significant changes in our building regulations. The Australian reforms represent a useful starting point in examining potential means of addressing many of the challenges facing the building industry today.

Appendix

Glossary of Terms

Interviewees in Australia

Endnotes

Glossary of Terms

ABCB - Australian Building Codes Board

AUBRCC - Australian Uniform Building Regulations Co-ordinating Council (the forerunner of the ABCB)

BAP - Building Appeals Board - the part of the BCC which hears appeals and resolves disputes relating to building control

BCA - Building Code of Australia

BCC - Building Control Commission - the statutory body established in Victoria to administer the state building regulations

BLA - Builders Licencing Australia - a national organization established to standardize the registration requirements for building practitioners among the states

BPB - Building Practitioners Board - the part of the BCC which administers the building practitioner registration system

BSA - Building Services Authority - the Queensland government organization which administers building regulations and runs the home warranty system

BSAP - Building Surveyors and Allied Professions Building Practitioner - the term used in building legislation in Victoria to describe those involved in the design, approval or construction of a building. It includes architects, engineers, draftspeople, building approval authorities, builders and sub-contractors

Commercial builders - contractors for non-residential buildings

Commonwealth - the federal government in Australia is frequently called the Commonwealth Government

Domestic builder - homebuilder in Canadian parlance - includes both builders of new homes and renovators

HGF - Housing Guarantee Fund - the government-run home warranty program in Victoria which was abolished when the new building regulations were introduced

HIA - Housing Industry Association - one of the organizations representing the housing industry in Australia

HOW - Home Owners Warranty - the privately-run insurance arm of the HIA

Local authority or council - Australian municipalities are commonly referred to as local authorities or councils

MBA - Master Builders' Association

NSW - New South Wales - the most populous state in Australia

VCAT - Victorian Civil and Administrative Tribunal - the forum to resolve disputes between builders and owners

Interviewees in Australia

Federal and State Governments (and Statutory Bodies)

NAME:	DEPARTMENT:	TITLE:
Ivan Donaldson	ABCB	Executive Director
Mike Balch	ABCB	Deputy Executive Director
Max Croxford	Victoria BCC	Commissioner - Building Control Commission
John Kotsopoulos	Victoria BCC	Principal Policy Advisor
Allan Rumble	Victoria BCC	Principal Officer - Building Appeals Board
Peter Nassau	Victoria BCC	Manager, Projects - Building Australia International
George Capetanakis	Planning - South Australia	Manager - Building Standards and Policy
Matt Miller	Queensland BSA	General Manager - Building Services Authority
Ian White	Queensland BSA	Executive Manager - Dispute Management
Ain Kuru	Queensland Local Government	General Manager - Building Standards
Jesse Chadwick	Queensland Local Government	Project Leader - Planning Policy
David Manzie	Queensland Housing	Manager - Property Portfolio
Steve Durnford	NSW Local Government Dept.	Manager Building Codes and Standards
Alan Host	NSW Local Government Dept.	Assistant Manager Building Codes and Standards
Ron Rodgers	NSW Urban Affairs	Seconded from Local Government Dept to and planning assist with new integrated development assessment legislation
Keith Hatfield	ACT - Urban Services	Manager - Regulation
Ron Foster	Federal Treasury	Manager, GST Administration and Payment Design
Ravi Prasad	Federal Treasury	Policy Advisor, GST Administration and Payment Design

Industry Associations

NAME:	ASSOCIATION:	TITLE:
Ron Silberberg	HIA	National Managing Director
Ruth Morschel	HIA	National Director - Research and Policy
Peter McMahon	HIA	National Assistant Director - Industry Policy
Mark Kotorac	HIA - Australian Capital Territory	Director - ACT/Southern NSW
Alan Sims	HIA - Australian Capital Territory	Technical Advisor
Wilhelm Harnisch	MBA	National Deputy Executive Director
Mike Harding	MBA	National Technology Director
Graham Wolfe	HIA - NSW	National Assistant Director - Building Codes and Standards
Stephane Kerr	HIA - NSW	National Director - Planning and Development
Leone Dennis	HIA - NSW	Assistant Director - Planning and Development
John Gaffney	HIA - Victoria	Director - Victoria
Michael Fagan	HIA - Victoria	Senior Technical Advisor
David Turner	HIA - Victoria	National Operations Manager, Home Owners Warranty
Neil Evans	MBA - Victoria	Manager - Certification and Technical Services
Greg O'Brien	MBA - Victoria	Building Surveyor/Inspector
Martin Walsh	HIA - South Australia	Director - South Australia
Justin Bayard	HIA - South Australia	Assistant Director - Materials and Workmanship
Ian Hewitt	MBA - South Australia	Housing Sector Manager - South Australia
Warwick Temby	HIA - Queensland	Director - Queensland
Rick Wiley	HIA - Queensland	Assiscant Director - Planning and Development
Trevor Rieck	HIA - Queensland	Assistant Director - Environmental Codes and Practices
Paul Seaton	HIA - Queensland	International and Trade Advisor
Chris Boyle	MBA - Quensland	Building Services Manager

Private Companies

NAME:	COMPANY:	TITLE:
Lyall Dix	Group Manager - Building Safety Services (Sydney)	Building consultant
Kim Lovegrove	Lovegrove Solicitors (Melbourne)	Construction lawyer
Chris Bovill	Bovill Risk and Insurance (Melbourne)	Insurance consultant
Stephane Amilhau	Senior Underwriter - SCOR (Paris, France)	Construction insurance
Michael Rigg	Director - Urban Spaces (Melbourne)	Builder and Architect
Trevor Fasham	Managing Director - Fasham-Johnson (Melbourne)	Builder
Brian Stacey	Architectural Manager - Fasham-Johnson (Melbourne)	Builder
Jim Thompson	National Building Manager - AV Jennings (Melbourne)	Builder
Tony Denison	Henley Properties (Melbourne)	Builder
Michael Boyd	Director - Parnell Cranston (Adelaide)	Insurance broker
Chris Short	Blue Chip Building Consultants (Adelaide)	Building consultant
Kim Rowland	Katnich Dodd (Adelaide)	Building consultant
Alan Greet	Managing Director - Qld Building Consulting	Building consultant
Varoujan Bedrossian	Director - Shavar Pty Ltd (Sydney)	Building consultant
Louis Sultan	Managing Director - Louis Sultan Homes (Brisbane)	Builder
Brian Robertson	Building Director - Dixon Homes (Brisbane)	Builder

Endnotes

[1]Building practitioner is the term used in Victoria to describe those involved in the design, approval or construction of a building - including architects, engineers, draftspeople, building approval authorities, builders and sub-contractors.

[2]Rowena E. Moyes, *Liabilities in the Residential Sector (Interim Report)*, May 1998, funded by CHBA and CMHC, provides a more detailed discussion of liabilities.

[3]Australia has six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two territories (Australian Capital Territory and Northern Territory). For simplicity, references to the states in this report encompass the territories as well as the states.

[4]Building Regulation Review Task Force, *Microeconomic Reform: Building Regulation*, March 1991, page i. Much of the discussion in this section is taken from this report.

[5]Unlike the administrative component of the recommended national framework, the Building Code of Australia was already in existence when the Task Force reported, though its adoption by the various states was uneven. The prime focus of the (now fully performance-based) BCA is to promote health, safety and structural sufficiency in Australian buildings through a common set of technical regulations adopted by all states. It appears that many of the functions of the proposed Australian Building Regulation Board are performed by the ABCB which was not in existence when the Task Force reported. The ABCB has responsibilities beyond merely developing and managing the BCA - in terms of promoting efficiencies in the broader building regulation system in Australia.

[6]Ibid, page 5.

[7]The AUBRCC was the forerunner to the current Australian Building Codes Board (which was formed in 1994). Established in 1980 as the (intergovernmental) body responsible for building standards in Australia, the AUBRCC published the first Building Code of Australia in 1988.

[8]Lyall Dix, "Project Supervisor's Commentary", *The Model Building Legislation for Consideration by the States and Territories*, AUBRCC, 1991, page 10.

[9]Kim Lovegrove, "Project Director's Commentar", Ibid, pages 27-29

[10]Lovegrove, op. cit. page 33

[11] Ibid, page 33.

[12] Ibid, pages 34-35.

[13]Lyall Dix, the Project Supervisor for the AUBRCC Model Building Act project was then Director of Building Control in Victoria. Other state staff were also heavily involved in the project.

[14]At the time of writing of this report, private certification was in place in all states except Western Australia and Tasmania - it is expected to be introduced in these states in the future. In New South Wales and the ACT, private certification has only recently been introduced and is still in the introductory stage.

[15]Currently, two (competitive) professional organizations (Building Surveyors and Allied Professions Accreditation Board (BSAP) and the Australian Institute of Engineers) have emerged as likely accreditation bodies in New South Wales. However, some fine-tuning of the state's new system would appear necessary since the two organizations are apparently not applying a common set of criteria for accrediting building certifiers.

[16]Under the Mutual Recognition Act 1992 [An Act to provide for the recognition within each state and territory of the Commonwealth of regulatory standards adopted elsewhere regarding goods and occupations], professionals with the qualifications (either formal educational prerequisites or job experience) to practice in one state can obtain registration in another state even if the qualification requirements in that state may be somewhat different.

[17]In Victoria, for example, building certifiers may use a "Form 13" (a document prescribed by the BCC) from another professional (e.g. a structural engineer) to certify that particular aspects of a building comply with the necessary regulations.

[18]As is discussed below, the requirement for planning approvals is a major concern for the building industry in Australia. Many observers believe that too much discretion is afforded to local authorities in planning matters and that more buildings should be able to proceed "as of right" or with private planning certification.

[19] A discussion paper released by the South Australian Building Standards and Policy Branch *(Improving the Quality of Residential Construction,* March 1999), following consultation with the industry and other parties, recommends that local authorities be required to inspect new residential buildings (and renovations) on an audit basis (e.g. the discussion paper suggests an average of two inspections per building on 20% of buildings).

[20]The exceptions are the ACT and Northern Territory. In both these jurisdictions, the building certification role had previously been performed by the Territorial government. Rather than be exposed to a conflict of interest situation (i.e. offering building certification services at the same time as regulating the activities of private sector building certifiers), both governments effectively vacated the field to private building certifiers and are concentrating only on regulation.

[21]Some states (e.g. Queensland and NSW with their "integrated development assessment systems") are requiring local authorities to "codify" their criteria for development in areas designated for particular types of development. This should provide the necessary basis for future private certification of planning in some areas; however, planning control is clearly a more sensitive area than building control - particularly in existing neighbourhoods.

[22]While the building practitioner is personally responsible (to the BPB) for the actions of the company, the compulsory insurance is issued to the company, which also carries any liabilities which may not be covered by the insurance policy.

[23]In contrast to Canada, where home warranty coverage was (until recently) voluntary in most provinces and operated by non-profit warranty providers, warranty coverage in most parts of Australia was traditionally provided through a state government monopoly - and coverage was compulsory. Now, most states have abolished the state warranty programs; domestic builders are still required to provide warranties to buyers, but the coverage is provided through private "for-profit" insurance companies.

[24]There were apparently plans for the BPB to test these "grandfathered" builders to ensure that they met some minimum standard, but this was not carried through. Unless their work is found to be in contravention of the regulations (through complaints or audits), it is unlikely that these builders will need to prove their qualifications.

[25]Queensland is also the only state which has government-run home warranty insurance. Since the BSA also operates the warranty program, it could be argued that it includes these criteria in its capacity as the insurer.

[26]For example, there have apparently been a number of builders registering with the BPB for the first time who indicate that they have an extensive track record in home building. Previously, while builders were supposed to register with the Housing Guarantee Fund, controls on bogus owner-builders were not so strict and, since owner-builders were exempt from registering, many bogus owner-builders escaped detection.

[27]Schedule 3, Form 1 of the Regulations of the Building Work Contractors Act.

[28]The discussion here relates to the insurance coverage required by various states' building regulations. It does not include other types of typical construction insurance coverage such as contract works or public liability insurance to cover against property damage or personal injuries.

[29]In fact, according to some observers, there are circumstances in which automatic run-off cover ceases to apply. These, however, appear to be details which could be rectified through changes in administrative procedures. Nonetheless, the concept of automatic run-off cover presents some difficulties for professionals who may move from practicing on their own (and therefore requiring indemnity insurance) to working for another company (where the required insurance is handled differently) - should the company's insurer be required to cover the professional's previous work (even though it was undertaken when the person was independent)?

[30]HOW is backed by the Royal Sun insurance company. Similar warranty insurance schemes are offered by other organizations, including the Master Builders Association.